

5

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 22 OF 2015

(ARISING OUT OF MISCELLANEOUS APPLICATION NO. 346 OF 2013)

10

(ARISING OUT OF HCCS NO. 806 OF 2007)

UGANDA POULTRIES LTD ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. RHODA KAWUMA

15

2. ANGELLA NAKABIRI NAJJEMBA :::::::::::} ::::::::::: RESPONDENTS

3. PATRICK KAMBUGU (Executrices and Executors of the Will of the Late

WILLIAM WILBERFORCE MITIGYALUGO WALABYEKI)

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

20

UGANDA POULTRIES LTD.(hereinafter referred to as the “Applicant”) brought this application under *Section 98 of the Civil Procedure Act (Cap.71); Order 26 r.2 (2) and Order 52 rr.1&2 of the Civil Procedure Rules (SI 71 – 1)* seeking orders that;

(a) *The order dismissing HCCS No. 806 of 2007 be set aside.*

(b) *HCCS No. 806 of 2007 be reinstated and heard on merits.*

25

(c) *Costs of this application be provided for.*

The grounds as set out in the application are that;

- i) *The Applicant filed HCCS No. 806 seeking reliefs from this Court, and prior to the dismissal of the suit on grounds of failure to pay security for costs had already diligently presented its case by giving evidence through its witnesses.*
- 30 ii) *The Applicant is duly interested in the hearing on merit of HCCS No. 806 of 2007 as the same impacts greatly on its ownership of the suit property.*
- iii) *Upon being ordered to furnish security for costs worth UGX 20,000,000/= in Miscellaneous Application No. 346 of 2013, the Applicant diligently sought to raise the required amount though it could not deposit the same by the said date*
35 *of 30th July, 2013, as the process and attempts to raise the money could not be completed within the time prescribed.*
- iv) *That, however, on the 6th January, 2014, the Applicant deposited with this Court UGX 20,000,000/= as security for costs and in compliance with the orders of this court.*
- 40 v) *That despite payment of the security for costs, the Court unaware of the fact that the Applicant had paid security for costs dismissed HCCS No. 806 of 2007 on the 10th December, 2014.*
- vi) *That there is sufficient reason/cause for the delay to pay security for costs and that it is fair and in the interest of justice that this application be allowed and*
45 *HCCS No. 806 of 2007 be heard on its merits.*
- vii) *That the Respondents will not be prejudiced in any way if the matter is reinstated.*

The grounds of the application are amplified in the affidavit supporting the application, of Mr. Richard Kiboneka, an Advocate with the firm of lawyers representing the Applicant.

50 They are as follows;

1. *That I am an Advocate of the Courts of Judicature and other Courts subordinate thereto practicing as such with M/s Nyanzi, Kiboneka & Mbabazi Advocates, the duly authorised Counsel for the Plaintiff herein the Applicant and in that capacity swear this affidavit.*
- 55 2. *That on the 31st day of May, 2013, the Applicant was ordered and agreed to pay security for costs worth UGX 20,000,000/= in HCCS No. 806 of 2007 by the 30th day of July, 2013.*
3. *That owing to the quantity of the sum, the Applicant diligently embarked on finding sources from which to raise the said sum and these sources include an*
60 *application for a loan from Standard Chartered Bank Ltd.*
4. *That being a company, the documentation for acquisition of the loans was quite elaborate and time consuming through the bank promised to avail the sum before the set time of payment; a commitment the bank never fulfilled.*
5. *That nevertheless, the Applicant managed to obtain money and on the 6th day of*
65 *January, 2014, the security deposit was made to this Court by our law firm of Nyanzi, Kiboneka & Mbabazi Advocates as per General Receipt attached hereto and marked "A".*
6. *That I am aware that despite paying this sum of costs, the Court unaware of the fact that the security deposit had been made proceeded to dismiss the suit.*

- 70 7. *That as an Advocate and the applicant's lawyer in HCCS No. 806 of 2007, I am aware that the Applicant diligently attempted to raise money to oblige to Court's orders but was let down by the bank that could not avail the money on time despite promising to avail it in a short time.*
8. *That I am further aware that the Applicant's decision to pay security for costs to*
75 *Court despite being out of time and the 3rd party disappointments to avail money on time form sufficient cause upon which this Court can exercise its discretion to reinstate HCCS No. 806 of 2007 and have it heard on merits.*
9. *That I am also aware that the Applicant as Plaintiff in HCCS No.806 of 2007 instituted the subject suit with substantial reason and claim and that it would be*
80 *in the interest of justice if the dismissal order is set aside and the suit is reinstated and determined on merit.*
10. *I CERTIFY that whatever is stated herein from paragraph 1 to 9 is true and correct to the best of my own knowledge.*

The Respondents never filed an affidavit in reply. Their Counsel Mr. Medard Lubega
85 Segona, in his submissions argued that there was nothing to reply to. Both Mr. Kabazi Richard Counsel for the Applicant also made oral submissions to argue the application. The respective submissions are on court record, and I do not propose to reproduce them in this ruling. The issues raised by this application are as follows;

- (1) *Whether the Applicant was prevented by sufficient/good cause from depositing*
90 *security for costs within time allowed by court.*
- (2) *What are the remedies available?*

Resolution of the issues:

Issue No. 1: Whether the Applicant was prevented by sufficient/good cause from depositing security for costs within time allowed by court.

95 The procedure governing the furnishing of security for cost is provided under **Order 26 CPR** as follows;

(a) The court may if it deems fit order a Plaintiff in any suit to give security for payment of all costs incurred by any defendant.”

The consequences of the failure to furnish the security for costs as required by the court
100 order under **Rule 2(1) (supra)** provides follows;

“If security is not furnished within the time fixed, the court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw from the suit.”

The provisions above were aptly considered in the case of **Banco Arabe Espanol vs.**
105 **Bank of Uganda [1999]2 EA 24**, where it was held, inter alia, that it is common ground that court’s power to dismiss the suit under **order 23 r.2 (1)** is automatic upon the plaintiff’s failure to comply with the order for security for costs; and that court has no alternative but to dismiss the suit in the event of non-compliance with terms of the order of furnishing of security for costs made under **Rule 1(supra)**.

110 Under **Rule 2(2) (supra)** a remedy is provided for a party whose case is dismissed under **Rule 2(1) (supra)** as follows;

“Where s suit has been dismissed under this rule, the plaintiff may apply for an order to be set aside, and; if it is proved to the satisfaction of the court that he or she was prevented by sufficient cause from furnishing the security within the
115 ***time allowed, the court shall set aside the dismiss upon such times as to security***

costs or otherwise at it thinks fit and shall appoint a day for proceeding with the suit. [Underlined for emphasis].

The plain import of the provisions above is clearly that a party who seeks the indulgence of court to set aside the dismissal order must be prepared to demonstrate sufficient or
120 good cause to the satisfaction of court for his or her failure to deposit the security for costs within the time set out in the court order. This position was succinctly reechoed ***Mavid Pharmaceuticals Ltd & A'nor vs. Royal Group of Pakistan & 2 O'rs, HCCS No. 26 of 2012.***

The phrase "sufficient cause" has no particular definition under the rules or even in the
125 statutes where it appears. However, ***Black's Law Dictionary 8th Edition at Page 231*** defines "sufficient cause" to be analogous to "good cause" or "just cause", which simply means "legally sufficient reason." Sufficient cause is often the burden placed on a litigant by court rules or order to show why a request should be granted or action or inaction excused.

130 In the instant application, Mr. Richard Kiboneka, an advocate in the firm of lawyers representing the Applicant swore an affidavit stating that upon being ordered to furnish security of Ug.Shs.20 million in ***Miscellaneous Application No. 346 of 2013***, the Applicant could not raise the money within the time allowed by court in the order in which the Applicant was given up to 30.07.2013. That however, the money was raised
135 and subsequently on 06.04.2014 it was deposited in court in compliance with the court order.

It should be pointed out at this stage, lest it is not appreciated, that on 10.12.2014 in another ruling in this particular case, this court refused the Applicant's attempts to have

the suit reinstated. The suit had been dismissed due to the failure to furnish security
140 within the time allowed by court in the order. The Applicant had falsely claimed, as in the
instant application, that the Applicant deposited security for costs with court, but that this
fact was unknown to court which dismissed the suit. Court found that actually no security
for costs was furnished within the time set in the order, and that the suit automatically
stood dismissed upon such failure. This simply restated the position on a similar matter in
145 ***Banco Arabe Espanol vs. Bank of Uganda case (supra)***.

In the instant application, the Applicant seeks to demonstrate sufficient cause why no
security for costs was furnished within the time set by the court order. It was sworn in the
affidavit in support of the application; specifically supporting ground (10) of the
application, that the Applicant on 06.04.2014 deposited the amount in court “in
150 compliance with the court order.”

The above depositions and the particular ground of the application once again are
erroneous like in the previous dismissed application. Even if the Applicant subsequently
raised the funds, merely depositing the money in court did not amount to compliance
with the terms of the court order. In any case, ***HCCS No.806 of 2007*** pursuant to which
155 the deposit in court was made was no longer in existence. There could be no compliance
with the court order as claimed by the Applicant because time within which to furnish
security had lapsed. Once the axe fell, it fell; and no subsequent depositing of the money
in court could revive the Applicant’s suit which automatically stood dismissed as from
30.07.2013 the date stipulated in the court order for the Applicant to comply.

160 Also to note is the fact that the Applicant purported comply with the court order by
depositing the money in court on 06.04.2014. This was after a period of over six month

from the time the court order was meant to be complied with, which in the circumstances if this case is inordinate delay. Such a delay simply shows lack of seriousness on part of the Applicant in complying with the terms of the court order, and further demonstrates
165 lack of diligence and vigilance in pursuing its case.

The Applicant's dismal failure in this case cannot be explained away merely by claiming that the Applicant is a company and as such could not raise the money in time and depended on third parties who never acted in time. Even if this was true, which was not shown to be so, the option in such circumstances should have been for the Applicant to
170 apply to court before the expiry of time set in the court order to extend time within which to furnish security after showing good cause for its inability to meet the deadline. This was not done and the subsequent depositing of the money into court was of no effect on the Applicant case that was long dismissed.

Furthermore, a cursory look at the affidavit in support of the application shows that it was
175 sworn by Mr. Richard Kiboneka an Advocate in the firm of lawyers representing the Applicant. He is apparently the one stating on oath that the Applicant embarked on the process of raising money. It is not the Applicant stating on oath that it embarked on the process of raising the money. The said lawyer does not appear anywhere else on court record. He is, however, the one stating for the Applicant, without even stating that he
180 obtained the information from the Applicant, that the Applicant embarked on the process of obtaining money to satisfy orders of court. He further states, in paragraph 4 of the affidavit that the Applicant being a company, the documentation for the acquisition of the loan was quite elaborate and time consuming. That although the bank promised to avail

the sum before the time set for payment of the security for costs the bank's commitment
185 was never fulfilled.

With due respect to Mr. Kiboneka, the claims in his depositions are unsupported. There is
no proof whatsoever of the alleged application which is usually in nature of a document
to the bank attached to the affidavit. Similarly, the purported bank commitment is lacking
to show that indeed such efforts were made by the Applicant. Most importantly, the
190 deponent does not state anywhere in the affidavit the source of his information.

Order 19 r.3 CPR which governs affidavit evidence requires that affidavits shall be
confirmed to such facts as the deponent is able of his or her knowledge to prove, except
on interlocutory applications, such as the instant one, on which his or her belief may be
admitted provided the grounds thereof are stated. The effect of the failure to disclose
195 sources of information was ably expounded upon in **Abdu Serunjogi vs. Sekito [1977]**
HCB 242; and **Bombay Four Mills vs. Patel [1962] EA 803**. In both cases, it was held to
the effect that where an affidavit is sworn to and the deponent does not disclose his or her
source of information, such affidavit is defective and should not be acted upon.

In the instant application, Mr. Richard Kiboneka is an Advocate in the firm lawyers
200 representing the Applicant. He does not work in the Applicant Company, and indeed has
no personal knowledge and does not allege to have personal knowledge of this matter. He
does not state that he has any information whatsoever from the Applicant. Therefore, the
facts he has sworn to are simply inadmissible under the law. The affidavit totally fails the
threshold reliability test required of such type of evidence.

205 Without relying on the affidavit evidence, the net effect is that the instant application is
totally unsupported and it collapses. On the whole, I agree with Mr. Segona's

submissions that no sufficient cause to the satisfaction of court has been shown to warrant the setting aside of the dismissal orders in *HCCS No. 506 of 2007*. The application is dismissed with costs.

210

**BASHAIJA K. ANDREW
JUDGE
05/11/2015**

215 Mr. Segona M. Lubega Counsel for the Respondent present.

Mr. Kabazi Richard Counsel for the Applicant absent.

Applicants present.

Respondent absent.

Mr. Tumwikirize Godfrey Court Clerk present.

220 Court: Ruling read in Court.

**BASHAIJA K. ANDREW
JUDGE
05/11/2015**

225